

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BRANDON CAIN #490544,

Plaintiff,

v.

CARMEN PALMER, et al.,

Defendants.

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Case No. 1:19-cv-628

HON. JANET T. NEFF

**OPINION AND ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983 involving Plaintiff's claim of retaliation by Defendants in violation of his First Amendment rights. Plaintiff filed two motions for summary judgment (ECF Nos. 29 and 33) and a Motion to Grant ECF No. 29 as Unopposed (ECF No. 49), arguing that because Defendants failed to timely respond to his previous motion, he is entitled to judgment. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (ECF No. 64), recommending that Plaintiff's motions be denied. The matter is presently before the Court on Plaintiff's objections (ECF No. 67) to the Report and Recommendation, to which Defendants have filed a response in opposition (ECF No. 75). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff argues that the Magistrate Judge erred in denying Plaintiff's motion to hold ECF No. 29 as unopposed even if Defendants' response was timely because Defendants challenged none of the facts raised by Plaintiff.

Plaintiff's argument is without merit. The Magistrate Judge properly determined that even if Defendants failed to file a timely response, Plaintiff is not entitled to summary judgment. First, Plaintiff's motion is premature because the Court must first address the matter of exhaustion, and if the Court determines that Plaintiff failed to exhaust his administrative remedies, the Court will dismiss his complaint without prejudice, even if Plaintiff could prevail on the merits. Moreover, Plaintiff has not met his burden of proof so as to be entitled to summary judgment based on his declaration. Plaintiff's objections are denied.

Plaintiff urges the Court to hold his summary judgment motion in abeyance pending the resolution of the exhaustion issue and an evidentiary hearing. The Magistrate Judge determined that Plaintiff's motion for summary judgment was premature, and in any event, failed on the merits. Plaintiff merely reiterates his flawed argument that he would be entitled to summary judgment based on his declaration and a statement of undisputed facts he submitted. There is no basis for holding Plaintiff's motion for summary judgment in abeyance.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court.

Therefore:

**IT IS HEREBY ORDERED** that the Objections (ECF No. 67) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 64) is APPROVED and ADOPTED as the Opinion of the Court.

**IT IS FURTHER ORDERED** that Plaintiff's Motions for Summary Judgment (ECF Nos. 29 and 33) and Motion to Grant ECF No. 29 as Unopposed (ECF No. 49) are DENIED.

Dated: June 30, 2020

/s/ Janet T. Neff  
JANET T. NEFF  
United States District Judge